



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 550

APPLICANT DS

RESPONDENT HW

The Tribunal orders:

- 1) HW's claim against DS is struck out.
- 2) DS's claim against HW is dismissed.

Reasons

1. On 10 April 2021, DS took his son's motorbike engine to HW for repairs and parts. He said that the bike was working but jumped when it was kickstarted. He paid \$800.00 to 'repair the gearbox and install a new piston'. Over the following weeks, HW told DS that there were delays with the parts arriving from overseas. He said that the delays were outside of his control due to COVID and ongoing overseas supply issues. On 13 August 2021, the engine was ready for pick up. Mrs S went to pick up the engine and paid the balance for the work – coming to a total of \$2,171.57. Once at home, DS installed the engine into his son's bike. However, during there were issues with the bike, including it jumping continuously into gear. DS attempted to ride the bike up the road. However, after about 500 metres the bike 'blew up'. DS called HW and took the bike to his workshop for testing. HW had the bike tested by his mechanic, Mr T. He stated that the cause of the fault was not due to any of his work, but due to work done previously to the bike. Over the following weeks, the parties could not find a resolution. DS now brings a claim against HW for \$2,271.50 for a refund of the money he paid for the motorbike engine work and costs. HW also brings a counter claim for \$30,000.00 against DS for defamation, harassment and loss of business and reputation caused by negative online posts.
2. The issues to be resolved are as follows:
 - a) Does the Tribunal have jurisdiction to hear HW's claim regarding defamation, harassment and loss due to digital harm?
 - b) Was the service provided by HW carried out with reasonable care and skill?
 - c) If not, is DS entitled to claim \$2,271.50?

Does the Tribunal have jurisdiction to hear HW's claim regarding defamation, harassment and loss due to digital harm?

3. The Disputes Tribunal Act 1988 (DTA) sets out the jurisdiction of the Tribunal to hear claims, as well as the limitations to that jurisdiction (s 10). The purpose of the DTA is to confine the jurisdiction of the Tribunal to common sense, straightforward issues that do not involve complex legal principles.¹ The DTA includes limitations on the Tribunal's jurisdiction to hear claims (s 11). Schedule 1 of the DTA lists other Acts under which the Tribunal has powers or jurisdiction.
4. At the previous hearing, it was accepted that HW's counter claim was based on defamation, harassment and economic loss due to digital harm. Claims based on these issues are generally covered by other legislation such as the Defamation Act 1992 and the Harmful Digital Communications Act 2015. On [date], HW's claim against DS based on these issues was heard in the District Court and determined by [Judge].
5. Based on all of the above and the relevant law, I am satisfied on the balance of probabilities that HW's claim has already been heard in the District Court and is outside of the jurisdiction of the Disputes Tribunal (s 17). Accordingly, the claim is struck out

Was the service provided by HW carried out with reasonable care and skill?

6. The Consumer Guarantees Act 1993 (CGA) applies if a person is a 'consumer' and the person from whom services are obtained, is a supplier. A consumer is defined in s 2 as a person who "acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic or household use". A person in trade is defined as a person in any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services (s 2).
7. I am satisfied that providing engine work and parts for a used motorbike is the kind of service ordinarily acquired for personal and domestic use and that HW was in trade when he provided his services. Therefore, I find that the provisions of the CGA apply.
8. The CGA provides consumers with guarantees. When a consumer acquires services from a supplier, these services must be carried out with reasonable care and skill (s 28). This means that the service provided by HW must be of the same standard of care and skill used by other professionals doing the same type of work.
9. I have had regard to all of the competing evidence, photos, expert opinions from the witnesses and submissions presented by both parties. I have also had regard to all the relevant law and the circumstances raised regarding the delays. Based on all of the above, on the balance of probabilities, I find that DS has failed to provide enough evidence to prove that HW did not provide his services with reasonable care and skill for reasons that include:
 - a. I accept that there were delays to deliveries from overseas to Aotearoa NZ due to the pandemic and ongoing restrictions in 2021. I find that this was outside of the control of HW. I find that the timeframe to complete the engine work was reasonable in the circumstances.
 - b. I accept that both parties had witnesses attend the first hearing. I accept that both parties' witnesses were 'experts' with many years of experience dealing with 'engines' in their own right. However, I find that the witnesses gave very different, competing opinions regarding the cause of the failure and the standard of the workmanship carried out on the engine. On the balance of probabilities, I find that neither witness was wholly independent, or overwhelmingly compelling.
 - c. I accept that DS referred several times to other independent motorbike engine 'experts' or advice from 'mechanics' he had about the workmanship of the engine work and parts, including the gasket and needit. An adjournment was granted to allow DS to provide evidence or expert witnesses. However, despite an

¹ Peter Spiller *The Disputes Tribunals of New Zealand* (2nd ed, Brookers, Wellington, 2003) at 24.

adjournment of almost six months that was granted to both parties, DS was unable to provide any evidence from independent industry experts to prove his claims at today's hearing.

- d. I accept DS's submission that he is a solo-father and does not have time to gather evidence. However, it is the responsibility of the parties to provide their evidence to prove their claims.

10. Therefore, based on all of the evidence and the relevant law, I am satisfied, on the balance of probabilities that DS has failed to prove that HW did not comply with the guarantee in s 28 of the CGA to provide his services with reasonable care and skill.

Is DS entitled to claim \$2,271.50?

11. Section 32 of the CGA provides that where a service fails to comply with a guarantee, the consumer may, where the failure can be remedied, require the supplier to remedy it within a reasonable time. If they fail to do so, the consumer may have the failure remedied elsewhere at the supplier's cost or cancel the contract. In addition, the consumer may also obtain damages from the supplier (s 32(c)). The Tribunal may award a refund of part, or all of the money paid for the services of the supplier (s 38). The Tribunal shall have regard to the value of any work or services performed by the supplier (s 39).

12. I have already found that DS has not proven that HW failed to provide his services with reasonable care and skill. I have also already accepted that the final delivery of the service was reasonable in the circumstances. Therefore, I am satisfied, on the balance of probabilities that DS is not entitled to claim a refund of \$2,271.50. Accordingly, the claim is dismissed.

Referee: DTR Fuli
Date: 6 October 2023



Information for Parties

Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 20 working days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact.

Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 working days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 working days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.